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No. 84-335

In the Supreme Court of the United States

OCTOBER TERM, 1984

JOHN N. MITCHELL, PETITIONER

v.

KEITH FORSYTH

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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I.

Respondent argues that petitioner should not be permitted to take an immediate appeal from the trial court's ruling that petitioner had violated a "clearly established" constitutional right and is therefore not entitled to qualified immunity.[1]

(a) Respondent says (Br. 10-11) that a claim of qualified immunity—unlike a claim of absolute immunity—is related to the merits in the sense that it requires an examination of the status of the constitutional right in question. But from this undeniably correct premise respondent draws an erroneous conclusion: that a ruling rejecting a qualified immunity defense cannot meet the

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[1] An additional case has been decided on this issue since our principal brief was filed. In *Powers* v. *Lightner*, No. 84-2312 (Jan. 16, 1985) (per Wisdom, J.), the Seventh Circuit followed the reasoning of the Fifth Circuit in holding that a denial of qualified immunity is not immediately appealable. The grounds for the court's decision are fully addressed in our opening and reply briefs.

"separability" prong of the *Cohen* test. See *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). Respondent simply ignores the fact that the qualified immunity ruling in a case such as this is separable precisely in the two ways that, under this Court's cases, matter for purposes of the *Cohen* collateral order doctrine. First, the ruling is separable in the sense that its disposition on appeal "will not 'affect, or * * * be affected by'" any remaining trial proceedings (*Abney* v. *United States*, 431 U.S. 651, 660 (1977)); thus the appellate court can now definitively and finally decide whether the undisputed facts amounted to the violation of a "clearly established" constitutional right.[2] Second, the qualified immunity ruling is separable and collateral in the sense that it involves a rule whose very purpose is to provide a threshold immunity from having to undergo an unmeritorious trial. Pretrial review is therefore a necessary adjunct to the vindication of the rule itself, and is not designed simply to secure an expedited review of the merits. That is why, contrary to respondent's argument (Br. 10), rejection of a qualified immunity claim is not at all like the rejection of an ordinary motion to dismiss under Fed. R. Civ. P. 12(b)(6) for failure to state a claim. Such a Rule 12(b)(6) motion tests the merits and is in no way designed to confer a threshold immunity from trial; the only purpose of appealing the rejection of such a Rule 12(b)(6) motion would be to secure a pretrial ruling on the merits—the very paradigm of the case to which the final judgment rule applies.

(b) Respondent, in defiance of the law of gravity, seeks to strengthen the foregoing argument by asserting (Br. 13-17) that qualified immunity does not seek to shield officials from trial, only from "liability in damages" (Br. 14); he concludes that, consequently, a ruling

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[2] See *Tubbesing* v. *Arnold*, 742 F.2d 401, 405 (8th Cir. 1984), recognizing the difference between qualified immunity and the merits of a *Bivens* case. See *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

rejecting this defense is fully and fairly reviewable on appeal from a final judgment. Respondent summarily shunts aside the frequent assertions of this Court to the contrary (see our opening brief at 14-15); his own citations (as we show in the margin [3]) do not in any way qualify the oft-repeated insistence of this Court that qualified immunity is designed to protect not only against ultimate liability but also against the burdens of meritless litigation.

Respondent contends (Br. 15) that only "insubstantial" *Bivens* suits should be quickly terminated and that a case

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[3] Contrary to respondent's contention (Br. 16), this Court's opinions do not contain "explicit statements to the contrary" of the notion that qualified immunity seeks to protect officials from trial as well as liability in undeserving cases. Respondent quotes a sentence from *Davis* v. *Scherer*, No. 83-490 (June 28, 1984), slip op. 6, stating that qualified immunity protects officials "from liability" for damages. But this sentence does *not* say that qualified immunity provides no additional protection. On the contrary, elsewhere in *Davis* (slip op. 11) the Court observes that "[t]he qualified immunity doctrine recognizes that officials can act without fear of harassing litigation * * * only if unjustified lawsuits are quickly terminated."

Respondent cites (Br. 14) *Harlow* v. *Fitzgerald*, 457 U.S. 800, 815 (1982), but the sentence to which respondent appears to refer merely states: "Qualified or 'good faith' immunity is an affirmative defense that must be pleaded by a defendant official." The Court did not suggest that qualified immunity is "only an affirmative defense against liability" (Resp. Br. 14). *Harlow* said precisely the opposite again and again (see Pet. Br. 14-15).

Respondent also cites (Br. 17) *O'Connor* v. *Donaldson*, 422 U.S. 563, 577 n.12 (1975). In *O'Connor* this Court held that the plaintiff in an action for damages under 42 U.S.C. 1983 had been the victim of unconstitutional conduct. The Court remanded for reconsideration of the defendant's qualified immunity claim. The Court stated (422 U.S. at 577 n.12): "Upon remand, the Court of Appeals is to consider only the question whether [the defendant] is to be held liable for monetary damages." This statement in no way supports respondent's view that qualified immunity is not intended to protect against meritless trials. In any event, at the time *O'Connor* was decided, qualified immunity generally did not protect the official from trial, as this Court noted in *Harlow* (457 U.S. at 814, 817) in explaining why it was necessary to adjust that standard.

can never be viewed as "insubstantial" if a district court has denied qualified immunity. See also *Powers* v. *Lightner*, No. 84-2312 (7th Cir. Jan. 16, 1985), slip op. 10; *Kenyatta* v. *Moore*, 744 F.2d 1179, 1184 (5th Cir. 1984). This very case refutes the argument. Respondent's claim is clearly barred by qualified immunity (see Pet. Br. 27-35); yet the district judge has steadfastly adhered to his contrary conclusion in the face of weighty authority directly on the point (see Pet. Br. 30-31), and has, by denying certification under 28 U.S.C. 1292(b), sought to insulate this unsupportable ruling from prompt appellate correction. If the rule of qualified immunity is going to do its job of assuring that officials are not deterred from the exercise of their functions by the fear of harrassing and unjust litigation, expedited appeal of such rulings is essential.[4]

(c) Respondent next argues (Br. 11-12) that qualified immunity claims often turn on disputed factual questions that cannot be resolved without trial, and that it is difficult and burdensome to identify those cases where the facts are not in dispute. This argument rests importantly on the premise (see Resp. Br. 11-12) that a defendant's motives and subjective intent will often be at issue in *Bivens* suits; it simply ignores the fact that, under *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982), the defendant's subjective state of mind is no longer relevant to the question whether the defendant is or is not immune because the constitutional right in question was or was not clearly established.

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[4] Respondent suggests (Br. 16) that an immediate appeal is not needed in this case because the punitive damages claim that was asserted below (see Pet. App. 76a, 33a-34a) has now been formally abandoned. Aside from the fact that this should not affect appealability of the district court's order, we must note that assurances that further proceedings will not prove burdensome to petitioner are far from comforting in light of respondent's insistence (Br. 3-4, 30-34) that petitioner's motives in authorizing the Davidon wiretap still may be challenged below.

Beyond this, the decision of the question whether the defense of qualified immunity should have been upheld as a matter of law is one that will in no way engulf the courts of appeals in the difficult terrain that so frightens respondent. Respondent asks (Br. 12):

> How is a court of appeals to determine in advance of a complete review of the case whether there are disputed facts on the qualified immunity issue?

The answer, of course, is that the wholly familiar rules governing appellate review of summary judgment rulings will be applied. If there is no dispute about the facts material to the immunity issue, the court need only determine whether the law governing the defendant's conduct was clearly established. See *Tubbesing* v. *Arnold*, 742 F.2d 401, 404-405 (8th Cir. 1984). Even where the court of appeals finds that the facts material to the immunity issue are in genuine dispute, the court must determine whether the facts as stated by the plaintiff add up to a violation of "clearly established" constitutional rules. There is nothing unusual or arcane about any of this. Nor is there anything about *Bivens* cases that makes this particularly burdensome or difficult.

Indeed, this is exactly what courts of appeals must do when claims of *absolute* immunity turn on factual issues (as they occasionally do, contrary to respondent's suggestion (Br. 10)).[5] The present case illustrates the point. In its initial decision in this case, the court of appeals held (Pet. App. 111a-113a) that petitioner would be absolutely immune if he authorized the wiretaps in a prosecutorial, rather than an investigative or administrative, capacity; and the court of appeals remanded (*id.* at 116a) for the district court to conduct "any additional inquiry" needed to resolve this factual issue. Since pre-

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[5] Contrary to his argument at page 10 of the brief, respondent elsewhere contends that both the absolute and qualified immunity issues are dependent upon resolution at trial of the same factual issue about petitioner's motives (Br. 3-4; see also *id.* at 40 n.28).

trial appeal of the denial of absolute immunity is not precluded by the possibility that such factual issues may arise in particular cases, the possibility of factual disputes does not justify a blanket prohibition of pretrial appeal where qualified immunity is denied.

(d) Respondent also asserts (Br. 17-19) that allowing appeals of orders denying qualified immunity will have a "crushing" impact on appellate dockets. This argument is unsupported and demonstrably false. As noted in our opening brief (at 17), no federal defendant, to our knowledge, has taken such an appeal in the District of Columbia Circuit in the 26 months since *McSurely* v. *McClellan*, 697 F.2d 309 (1982), allowed such appeals. Nor do we believe that any federal defendant has taken such an appeal in the Eighth Circuit during the 20 months since *Evans* v. *Dillahunty*, 711 F.2d 828 (1983), was handed down. And we have found only one reported Eighth Circuit decision involving a pretrial appeal by a state defendant contesting the denial of qualified immunity. *Tubbesing* v. *Arnold*, 742 F.2d 401 (1984). Based on this record, there is every reason to believe that the number of qualified immunity appeals will be modest.[6] And allowing such appeals will improve over-all judicial

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[6] Respondent refers in this connection (Br. 17 n.9) to the total number of civil rights cases filed in the district courts. This statistic is irrelevant. It includes *all* civil rights cases—whether for damages or nonmonetary relief; whether brought by or against individuals, units of government, or other entities; and whether the claim asserted was statutory or constitutional. The statistic refers to district court filings; it does not reveal how many of these cases were abandoned or settled before trial; nor does it disclose how many were appealed, much less how many were sought to be appealed before trial. See *Reports of the Proceedings of the Judicial Conference of the United States, Annual Report of the Director of the Administrative Office of the United States Courts* 248-249 (1983). Respondent does not cite any other statistical support—or, indeed, any other support—for his assertion that the workload of the courts of appeals will significantly increase if our position on appealability is accepted.

efficiency by helping promptly to terminate meritless and protracted litigation.[7]

II.

(a) Respondent asserts that in November 1970 it was "clearly established" that warrantless domestic security wiretaps were unconstitutional. Faced with the unwelcome fact that *Katz* v. *United States*, 389 U.S. 347, 358 n.23 (1967), expressly reserved decision on the legality of such warrantless electronic surveillance "in a situation involving the national security," respondent argues (Br. 24; emphasis in original) that "[a]s used in *Katz* and as explicated by this Court in other cases, the exception for national security was limited to *foreign intelligence* surveillances." Nothing in *Katz* supports this exegesis, and in *Keith*, where the Court finally passed on the constitutionality of warrantless *domestic* security wiretaps, the Court specifically noted that it was "address[ing] a question left open by *Katz* * * *" (*United States* v. *United States District Court*, 407 U.S. 297, 309 (1972)). The Court also acknowledged that "electronic surveillance in *internal security matters* without prior judicial approval" had been authorized by "[s]uccessive Presidents for more than one-quarter of a century * * * without guidance from the Congress or a definitive decision of this Court" [8] and that *Keith* "[brought] the issue [to this

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[7] As this Court recognized in *Abney* v. *United States*, 431 U.S. 651, 662 n.8 (1977), "[i]t is well within the supervisory powers of the courts of appeals to establish summary procedures and calendars to weed out frivolous claims of [immunity]." See, *e.g.*, *McSurely* v. *McClellan*, 697 F.2d 309 (D.C. Cir. 1982) (expediting a qualified immunity appeal and deciding it on the briefs so as not to disrupt the trial schedule).

[8] Respondent contends (Br. 27 n.16) that petitioner could not reasonably have relied on the practice of other Attorneys General prior to *Katz* because, until *Katz* was decided, nontrespassory surveillances were constitutional under *Olmstead* v. *United States*, 277 U.S. 438 (1928). However, there is no reason to believe that all of the warrantless national security surveillances conducted by peti-

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Court] for the first time" (*id.* at 299; emphasis added).[9]

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tioner's predecessors were nontrespassory. Further, it must be remembered that the question of the President's constitutional authority to conduct such surveillances was important even before *Katz* in view of the prohibition on interception and divulgence in 47 U.S.C. (1964 ed.) 605. See, *e.g.*, *United States* v. *Butenko*, 494 F.2d 593, 600-602 (3d Cir.), cert. denied, 419 U.S. 881 (1974). With respect to respondent's related argument (Br. 27 n.16) that petitioner's reliance on prior practice was unreasonable in light of Congress's failure during the 1940's and 1950's to enact legislation specifically dealing with national security wiretaps, see *United States* v. *Butenko*, 494 F.2d at 599-600.

[9] Respondent's inventive reading of *Katz* is not supported, as he contends (Br. 24-25), by either *Alderman* v. *United States*, 394 U.S. 165 (1969), or *Giordano* v. *United States*, 394 U.S. 310 (1969). *Alderman* and *Giordano* concerned the disclosure of illegally intercepted conversations, not the legality of electronic surveillances. Those cases held that the records of conversations overheard by illegal electronic surveillance must be turned over to criminal defendants with standing. In *Alderman*, the Court noted in passing (394 U.S. at 184; emphasis added): "It may be that the prospect of disclosure will compel the Government to dismiss some prosecutions in deference to *national security* or third-party interests." This observation did not mean, as respondent deduces (Br. 24), that all or even some warrantless national security wiretaps were illegal. This Court dealt only with the disclosure of illegally intercepted conversations and left it for the lower courts to decide on remand whether the wiretaps at issue were constitutional (394 U.S. at 186). Furthermore, the national security wiretaps in *Alderman* were directed against agents of a foreign power, and the Court has not to this day held that warrants are constitutionally required in such cases.

Nor does respondent's position gain from Justice Stewart's concurrence in *Giordano*, which noted (394 U.S. at 314-315) that the legality of warrantless foreign intelligence wiretaps had been left open in *Katz*. Justice Stewart's reference to foreign intelligence surveillance was natural, since he was discussing *Alderman* and its companion cases, which involved such surveillance. No negative pregnant regarding domestic security surveillances can fairly be read into his discussion.

Even if there were some implication in the *Alderman* and *Giordano* opinions that warrantless domestic security wiretaps were illegal, the standard under *Harlow* is whether the applicable rule of law was "clearly established," not whether the eventual resolution

Respondent simply ignores all of this. His position really suggests that the *Keith* litigation itself was an empty exercise, that the government should never have litigated the case, and that this Court really did not know what it was doing when it stated in *Keith* that the question was before it "for the first time." There is no warrant for such a retroactive rewriting of history.

(b) In our opening brief (at 28-29), we showed that petitioner's conduct in this case was supported by the then-existing lower court authority. Respondent's claim (Br. 26) that these cases did not concern domestic national security threats is incorrect.[10]

Respondent refers (Br. 26-27) to advice petitioner received from Solicitor General Griswold. Much as we may regret it, a Solicitor General's views do not automatically constitute "clearly established" law. In any event, the Solicitor General's memoranda on this subject (see 1 C.A. App. 228, 233) are plainly directed at issues of litigation strategy and tactics, and in no way purport to describe what was and what was not "clearly established" by existing law. As the court of appeals said about these very memoranda in *Zweibon IV*, 720 F.2d at 171, the Solicitor General was merely making "predictions as to future action by the Supreme Court and discuss[ing] strategic considerations for potential litigation." He did

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of the issue could have been predicted based on dicta in individual opinions, nuances of language, or other even less tangible grounds. See *Zweibon* v. *Mitchell (Zweibon IV)*, 720 F.2d 162, 172-173 (D.C. Cir. 1983), cert. denied, No. 83-2005 (Oct. 9, 1984).

[10] As the record below reflects (1 C.A. App. 82), both *United States* v. *Dellinger*, No. 69 CR 180 (N.D. Ill. Feb. 20, 1970) (J.A. 30), and *United States* v. *O'Neal*, No. KC-CR-1204 (D. Kan. Sept. 3, 1970) (J.A. 38), involved surveillance of the Black Panther Party, the same organization that was placed under surveillance in *Keith*. See *Sinclair* v. *Kleindienst*, 645 F.2d 1080, 1081 (D.C. Cir. 1981). Respondent's truncated quotation from *Dellinger* omits the reference in the same sentence to "information concerning domestic organizations" seeking to subvert the government by force (J.A. 32).

not "purport to declare what was then legally permissible conduct with respect to warrantless national security surveillance." *Ibid.* Other high-ranking Justice Department officials, including the Assistant Attorneys General for the Criminal and Internal Security Divisions, expressed contrary views.[11] As Attorney General, petitioner's obligation was to make a conscientious and prudent judgment about the needs of national security in the context of this uncertain and much-disputed legal environment. To conclude, 15 years later, that his decision violated "clearly established" rules would subvert the very heart and soul of the qualified immunity defense. It would say to our officials: when in doubt always reject the bolder course because the consequence of bold action may be ruinous personal liability. But the very purpose of immunity is to say to our officials that *personal* liability will attach *only* if there is no substantial doubt about the unconstitutionality of the course pursued.

(c) There is no merit in respondent's argument (Br. 28-34) that the wiretaps in this case, which sought information about the threatened plot to damage and cripple important federal facilities in Washington and kidnap Henry Kissinger (then engaged in secret negotiations to end the war in Vietnam), were not related to the national security. The district court in this case has already found

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[11] Numerous intra-departmental memoranda were prepared on the constitutionality of warrantless domestic security wiretaps. Some of those received by petitioner are included at 1 C.A. App. 223-241. Many others were found in an exhaustive search of departmental files conducted after the docketing of the appeal in this case. See Supplemental Response to Plaintiff's Interrogatories to Defendant (Apr. 8, 1983). In the particular memorandum quoted by respondent (Br. 26-27), the Solicitor General questioned whether this Court would sustain the constitutionality of warrantless domestic security wiretaps, but after receiving Assistant Attorney General Yeagley's contrary views (1 C.A. App. 223), the Solicitor General stated that "there is no reason for us to concede that only foreign intelligence surveillance may be constitutionally authorized by the Attorney General" (*id.* at 237).

that the wiretaps were conducted for national security purposes (Pet. App. 59a):

> The Attorney General stated that he approved the wiretaps as part of a national security investigation. The Court has taken defendant Mitchell at his word.

See also *id.* at 65a. Similarly, the district judge in *Burkhart* v. *Saxbe*, 596 F. Supp. 96, 101 (E.D. Pa. 1984) (Pet. App. 150a)) concluded in light of the unique threat posed by the ECCSL's plans that "[w]hatever may be a proper definition of a 'national security' wiretap, and its full contours, * * * the Davidon * * * wiretap[] certainly qualif[ied] as [a] national security wiretap[]."

Respondent provides no grounds for doubting this conclusion. A "clear or present danger to the existence of Government" (Resp. Br. 31) should not have to be shown before a threat can be investigated. Nor is the government precluded from gathering as much information as it can about a plot against the national security before arresting the known conspirators (compare Resp. Br. 31-32). Finally, it makes no difference that these surveillances had the effect of uncovering evidence of crime as well as serving to protect the national security (see Resp. Br. 28-34). The wiretaps were placed in order to detect and prevent the commission of acts threatening to the country's domestic security, and not simply to investigate crimes already committed. "No doubt one of the most effective means of halting subversive activity aimed at the violent disruption of the government is to criminally prosecute those involved." *Burkhart* v. *Saxbe*, 448 F. Supp. 588, 596-597 (E.D. Pa. 1978), rev'd on other grounds *sub nom. Forsyth* v. *Kleindienst*, 599 F.2d 1203 (3d Cir. 1979), cert. denied, 453 U.S. 913 (1981), on remand, 596 F. Supp. 96 (E.D. Pa. 1984);[12] see also S. Rep. 1097, 90th Cong., 2d Sess. 94 (1968).

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[12] In those cases in which the purpose of a wiretap is material to the authorizing official's qualified immunity claim, that purpose must be resolved consistently with this Court's focus in *Harlow* on the objective reasonableness of the official's actions. Thus, where,

(d) Respondent is unable to establish (Br. 35-36) that the Davidon surveillance offended clearly established minimization standards. Respondent does not cite a single case decided prior to *Keith* that addressed the minimization standards applicable to national security wiretaps. In *Berger* v. *New York*, 388 U.S. 41, 59-60 (1967), on which respondent relies (Br. 35), the Court discussed the minimization issue in the context of a wiretap conducted for criminal investigative purposes,[13] and nothing in the Court's opinion implied that the same minimization standards would apply in national security cases. On the contrary, five years later in *Keith* the Court clearly suggested that the same minimization requirements need not apply (see 407 U.S. at 322):

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as here, "the record discloses a rational national security concern, this should suffice, even though there may have been other possible reasons or motives." *Burkhart* v. *Saxbe*, 596 F. Supp. at 100 (Pet. App. 150a); accord *Smith* v. *Nixon*, 582 F. Supp. 709, 714-715 (D.D.C. 1984) (on appeal). Any other conclusion would destroy the very protection *Harlow* sought to give.

Further, respondent's claim that petitioner was improperly motivated in this case is based on selective citations to internal government memoranda that respondent does not even contend petitioner received. For example, respondent states (Br. 31) that "[a] high FBI official stated that there were 'no concrete plans' and that the 'kidnap plot' was 'rhetorical'" (*ibid.*). This is based on an internal FBI memorandum (1 C.A. App. 142-143) that noted that there were no concrete plans regarding the kidnapping (as distinguished from ECCSL's other objectives) and opined that while the kidnap plot may have been rhetoric, "the possibility exists that these individuals have the dedication of purpose to attempt to pull it off." Similarly, respondent questions (Br. 32-33) petitioner's judgment that it would be inappropriate to seek judicial authorization for the wiretap by citing an isolated reference by a Criminal Division staff attorney to his section chief that court-approved wiretaps might be used.

[13] It is doubtful that *Berger* clearly established generally applicable minimization standards for criminal investigative surveillances (see *Scott* v. *United States*, 436 U.S. 128, 139-140 (1978)), much less for national security cases.

> We recognize that domestic security surveillance may involve different policy and practical considerations from the surveillance of "ordinary crime." The gathering of security intelligence is often long range and involves the interrelation of various sources and types of information. The exact targets of such surveillance may be more difficult to identify than in surveillance operations against many types of crime specified in Title III. Often, too, the emphasis of domestic intelligence gathering is on the prevention of unlawful activity or the enhancement of the Government's preparedness for some possible future crisis or emergency. Thus, the focus of domestic surveillance may be less precise than that directed against more conventional types of crime.

In light of *Keith*, the lower courts, with the lonely exception of the district court in this case, have held that at least prior to 1972 there was no clearly established obligation to minimize the scope of national security surveillances. *Zweibon IV*, 720 F.2d at 170; *Chagnon* v. *Bell*, 642 F.2d 1248, 1262-1263 (D.C. Cir. 1980), cert. denied, 453 U.S. 911 (1981); *Sinclair* v. *Kleindienst*, 645 F.2d at 1082, 1085; *Burkhart* v. *Saxbe*, 596 F. Supp. at 101-102 (J.A. 151a-154a).[14]

(e) Respondent finally contends (Br. 36-38) that the wiretaps in this case violated clearly established statutory standards contained in Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510 *et seq.* This argument ignores the holding in *Keith* that the provision of Title III dealing with national security surveillance, 18 U.S.C. (1976 ed.) 2511(3), simply "left presidential powers where it found them" (407 U.S. at 303). The Court elaborated (*id.* at 306; footnote omitted):

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[14] Contrary to respondent's suggestion (Br. 35), petitioner promulgated internal minimization requirements even though not required to do so by law. *Sinclair* v. *Kleindienst*, 645 F.2d 1080, 1082, 1085 (D.C. Cir. 1981).

> [I]t would have been incongruous for Congress to have legislated with respect to the important and complex area of national security in a single brief and nebulous paragraph. This would not comport with the sensitivity of the problem involved or with the extraordinary care Congress exercised in drafting other sections of the Act. We therefore think the conclusion inescapable that Congress only intended to make clear [by 2511(3)] that the Act simply did not legislate with respect to national security surveillances.

See *United States* v. *Butenko*, 494 F.2d 593, 600 n.25 (3d Cir.), cert. denied, 419 U.S. 881 (1974) ("[T]he only limitations on the President's authority to engage in * * * [national security] electronic surveillance are those set forth in the Constitution.").

III.

(a) Respondent offers two principal arguments why an Attorney General should not be absolutely immune from suit for damages when he acts to protect national security. Respondent contends (Br. 44-45) that absolute immunity is unnecessary because qualified immunity pro-

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[15] In its initial decision in the *Zweibon* case, the District of Columbia Circuit concluded that *Keith* "offers only ambiguous guidance" on the statutory question and held that Congress must have intended "the applicability of the statute [to be] contingent upon further judicial pronouncements * * *." *Zweibon* v. *Mitchell* (*Zweibon I*), 516 F.2d 594, 660, 666 (D.C. Cir. 1975) (en banc, plurality opinion) (emphasis omitted), cert. denied, 425 U.S. 944 (1976). The court concluded, in part for policy reasons, that Title III generally should apply to national security surveillances.

In relying on the *Zweibon I* decision, respondent neglects to mention the court of appeals' later decision in that case, holding that "[t]he plurality's application of Title III to unconstitutional national security surveillance represented the sort of sharp break in the law which should be restricted to prospective effect." *Zweibon* v. *Mitchell* (*Zweibon III*), 606 F.2d 1172, 1182 (D.C. Cir. 1979), cert. denied, 453 U.S. 912 (1981).

vides sufficient protection. We already addressed this argument at length in our opening brief (at 36-39). We merely reiterate here that the identical argument can always be made when absolute immunity is sought. Why isn't qualified immunity sufficient for judges, prosecutors, witnesses, jurors, and the President? Qualified immunity is supposed to fail only where clearly established legal standards were violated. What justification can there be for holding an officer who violated such standards immune?

The answer is that qualified immunity—even after *Harlow* and even if our position on appealability is adopted—still exposes a *Bivens* defendant to substantial risks and burdens. The defendant must persuade a district judge, many years later, that he did not violate clearly established law; he must bear the burden of appeal if, as in this case, a district court mistakenly and stubbornly denies a valid qualified immunity claim; and if there are genuine factual disputes relating to his immunity claim, he may have to undergo discovery and trial. As this case shows, these can be formidable burdens, and they may interfere with "the unhesitating performance of functions vital to the national interest." *Harlow* v. *Fitzgerald*, 457 U.S. at 812. A defendant official may be distracted from urgent public business by proceedings in a pending suit for damages, and in making decisions of great public importance an official may hesitate to do what he feels is necessary and proper for fear that he might be sued personally in damages. In short, respondent's broad argument proves too much, for it suggests that absolute immunity is never appropriate. This Court has of course rejected that proposition.

The fundamental question is whether we want a particular public official performing a particular function to discharge his public responsibilities without the distractions and hesitations that the fear of personal damages litigation may occasion. As this Court made clear in *Harlow* and *Nixon* v. *Fitzgerald*, 457 U.S. 731 (1982),

some functions of government, assessed in light of our constitutional heritage and structure, are so fundamentally important to the national well-being that the public interest demands their "unhesitating performance" (*Harlow*, 457 U.S. at 812), which only absolute immunity can assure. As respondent's own brief reflects (Br. 19-34), the core of this case is the Attorney General's judgment that the national security was threatened and that a particular response was called for, one that he deemed to be within the President's Article II powers. This judgment was made in the performance of functions that, under our constitutional scheme, are central to the office of Attorney General and to the office of President. It is critically important that the performance of those functions be unclouded by concerns about personal liability.

Respondent also argues (Br. 40-43) that, while absolute immunity might be appropriate with respect to some national security decisions (Br. 41), it is unnecessary in the narrow circumstances of this case. In respondent's view, this Court should not consider the general question whether the Attorney General needs absolute immunity when he acts to protect national security. Instead, respondent suggests, the Court should focus narrowly on the warrantless domestic security wiretaps carried out here, and ask whether the national security would have been impaired had petitioner sought warrants before conducting these wiretaps.[16]

The difficulty with this argument is that the point of absolute immunity in the area of national security deci-

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[16] Respondent incorrectly asserts (Br. 42) that the only reason petitioner did not seek a warrant was his generalized view that national security matters were too complex for a judge. In fact, petitioner testified at his deposition that he did not believe that Dr. Kissinger's negotiations should be disclosed to a court (2 C.A. App. 140). More basically, petitioner explained that seeking judicial approval under Title III (or utilizing its emergency provision, 18 U.S.C. 2518(7)) would have been inconsistent with his view that national security wiretaps were the responsibility of the Executive not the Judicial Branch (2 C.A. App. 141).

sions—to eliminate the prospect of burdensome and unmeritorious litigation as definitively as possible—would be destroyed if it were subject to unspecified exceptions, to be applied retroactively by the courts in the light of their ex post facto judgment that the national security could have been safeguarded even if the defendant had not acted or had used different means. Respondent's argument therefore does nothing but repose the fundamental question: do we want the Attorney General to deal with vital national security concerns with the ever-present thought that he is subject to suits for personal damages whenever he does not pursue the most cautious course, one that by hindsight may be viewed as sufficient to meet the threat? We think the answer is clear. Our legal and political system provides alternative checks and restraints to discourage and punish blatant violations of constitutional rights. In this special and sensitive context the threat of personal damages liability is an additional deterrent that would exact too high a price.[17]

(b) Respondent's remaining arguments on absolute immunity are insubstantial. Respondent argues (Br. 39-40) that Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510 *et seq.*, abrogated any immunity enjoyed by the Attorney General with respect to electronic surveillance. As previously noted, however, in *Keith* this Court reviewed the language and legislative history of Title III and concluded (407 U.S. at 306) that Congress "simply did not legislate with respect to na-

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[17] In our opening brief (at 39 & n.27) we noted that an Attorney General may have great difficulty in defending against a damages suit concerning national security matters because of his inability to obtain or disclose confidential information. Respondent suggests (Br. 44-45 n.31) that the privilege for national security information "most often prejudices a plaintiff." This assertion is unsupported and, in any event, is little comfort to those defendants who are seriously prejudiced. See also *Ellsberg* v. *Mitchell*, 709 F.2d 51, 64-66 (D.C. Cir. 1983) (damages action should not be dismissed where classified information is needed only to make out a qualified immunity defense).

tional security surveillances." Since Title III did not regulate national security surveillances, it did not affect the Attorney General's immunity in that sphere.[18]

Respondent maintains (Br. 42) that "[p]etitioner's request for absolute immunity here is in fact nothing other than an attempt to reargue *Keith*." But *Keith* had nothing to do with personal damages liability or immunity from such liability. The government is not in any way asking this Court to reexamine *Keith's* conclusion that the Constitution requires warrants for domestic security wiretaps. (It is in full compliance with that ruling and has no intention to depart from it.) The question here is sharply different: whether Attorneys General making decisions in the context of national security should in the future be constrained by the knowledge that they are continuously subject to personal liability litigation with

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[18] Contrary to respondent's contention (Br. 39 n.26), petitioner did not concede below that Title III abrogated absolute immunity (Resp. Br. 39 n.26). Instead, the referenced district court filing noted that Title III would eliminate petitioner's absolute immunity only "[i]n the event the Court holds Title III applicable to national security surveillances, contrary to the authorities urged by defendants * * *" (Defendants' Response to Plaintiff's Cross Motion for Summary Judgment at 50 n.50 (July 6, 1976)). As already discussed, however, there is no indication that Congress intended to make the Attorney General liable for national security surveillances when it enacted Title III. Compare *Nixon* v. *Fitzgerald*, 457 U.S. at 748-749 & n.27 (Court will not assume that Congress intended to waive immunity grounded in constitutional responsibilities in the absence of "explicit affirmative action by Congress.").

It is true that the Foreign Intelligence Surveillance Act of 1978, 50 U.S.C. 1801 *et seq.*, repealed the provision of Title III, 18 U.S.C. (1976 ed.) 2511(3), that disclaimed any intent to regulate national security wiretaps. The effect of this repeal was to make domestic national security wiretaps subject to Title III's requirements. However, respondent is clearly wrong in suggesting (Br. 39) that the 1978 Act retroactively withdrew petitioner's immunity more than seven years after the Davidon wiretap. By its terms, the 1978 Act had only prospective effect (50 U.S.C. 1801 note), and the accompanying Senate Report recognized that Title III had "disclaimed any intention of legislating in the national security area" (S. Rep. 95-604, 95th Cong., 2d Sess. 12 (1978)).

respect to these decisions. Our submission is that such a constraint is unwise and unnecessary.

For these reasons and the reasons set forth in our opening brief, it is respectfully submitted that the judgment of the court of appeals should be reversed and the case should be dismissed.

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